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*Federal Public Sector
Labour Relations and
Employment Board Act and
Public Service Employment Act*



Before a panel of the
Federal Public Sector
Labour Relations and
Employment Board

BETWEEN

JASON LYSAK

Complainant

and

COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

Respondent

and

OTHER PARTIES

Indexed as

Lysak v. Commissioner of the Royal Canadian Mounted Police

In the matter of complaints of abuse of authority under sections 77(1)(a) and (b) of the
Public Service Employment Act

Before: David Orfald, a panel of the Federal Public Sector Labour Relations and
Employment Board

For the Complainant: Satinder Bains, representative, Union of Safety and Justice
Employees (USJE-PSAC)

For the Respondent: Jena Montgomery, counsel

For the Public Service Commission: Alain Jutras, senior analyst

Heard via videoconference,
December 7, 2022.

REASONS FOR DECISION

I. Introduction

[1] This decision concerns a motion by the respondent, the Commissioner of the Royal Canadian Mounted Police (RCMP), to dismiss these two complaints on the basis that the complainant, Jason Lysak, did not have standing to make them. Its motion was based on its contention that the complainant was not within the area of selection established for the appointments in question and therefore did not have standing to make a complaint, given the provisions of s. 77 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; “PSEA”), and that the complainant’s priority status for reappointment did not provide him with a right of recourse for this appointment process.

[2] The complaint in Board file no. 771-02-40003 (“complaint 1”) was made on March 31, 2019, and is about an indeterminate appointment made on March 26, 2019 (“the indeterminate appointment”). The complaint in Board file no. 771-02-41020 (“complaint 2”) was made on September 30, 2019, and is about an acting appointment made on September 26, 2019 (“the acting appointment”). Both appointments were made from an advertised appointment process (numbered 18-RCM-IA-WPG-D-78254; “the appointment process”) for the position of Lead Hand Technician, classified at the GL-VHE-10 group and level, located at the RCMP Post Garage in Winnipeg, Manitoba (“the Winnipeg Post Garage”), sometimes referred to in the documents as the “D Division Post Garage”.

[3] The Winnipeg Post Garage is a shop for outfitting and maintaining RCMP vehicles. The GL-VHE group is composed of vehicle mechanics.

[4] The appointment process established an area of selection that read as follows: “Persons employed at the Royal Canadian Mounted Police occupying a position in the Post Garage Unit in Winnipeg, Manitoba.”

[5] Given the respondent’s motion, the question before the Federal Public Sector Labour Relations and Employment Board (“the Board”) is whether the complainant had standing to make these complaints, and in particular whether he occupied a position in the Winnipeg Post Garage.

[6] The record before the Board is that the complainant had occupied a GL-VHE-10 senior technician position in the Winnipeg Post Garage but that he began a period of leave for care of immediate family effective July 4, 2016. On August 29, 2017, the RCMP informed him that his position was permanently backfilled because his leave had exceeded one year and that he was being granted priority status for reappointment in accordance with s. 41(1)(a) of the *PSEA*, effective September 5, 2017.

[7] When the complaints were made in 2019, the complainant was not working at the Winnipeg Post Garage or elsewhere in the federal public service, and he still had priority status for reappointment.

[8] The respondent argued that while persons with this type of priority status remain employed for certain purposes, such as benefits and the right to request leave, they do not “occupy a position”. The appointment process required applicants to occupy a position in the Winnipeg Post Garage. The complainant did not occupy such a position and therefore was not within the area of selection. An employee must be within the area of selection to make a complaint under s. 77 of the *PSEA*, it argued.

[9] The respondent also invoked s. 43 of the *PSEA*, which allows the deputy head not to consider a person with a priority entitlement (PPE) if the appointment of that person will result in another person having a priority right.

[10] The Public Service Commission (“the PSC”) agreed with the respondent that the complainant did not have a right of recourse with respect to either the indeterminate or acting appointment. Its arguments, reproduced more fully in the reasons that follow, addressed the ability of employees on priority status to make a complaint under the *PSEA*, particularly in a context in which the department at issue has invoked s. 43.

[11] The complainant argued that when the complaints were made, he was still an RCMP employee. His substantive position before being placed on priority status was with the Winnipeg Post Garage. During the same time frame in which he made these complaints, the RCMP notified him that he was under administrative investigation in relation to allegations of theft at the Winnipeg Post Garage. The respondent sought to deliberately exclude him from applying for these positions, the complainant argued, meaning that he has been unable to return to active work. The Board should have

jurisdiction to investigate why the respondent chose the appointment process and area of selection and to exclude him from consideration, he argued.

[12] For the reasons that follow, the respondent's motion is allowed, and the complaints are dismissed.

II. Procedural issues

[13] To help provide a framework for my reasons for decision, I will begin by reviewing several procedural issues that arose before the hearing.

A. Motion to dismiss complaint 1

[14] As noted, complaint 1 was made on March 31, 2019. In it, the complainant stated that the staffing action in question "... once again bypasses [his] priority status." He said that the RCMP deliberately excluded him from consideration. He complained that the RCMP failed to adhere to the *Priority Administration Directive* (which governs the administration of the priority administration system) by not considering his candidacy and facilitating his return to active work.

[15] On June 12, 2019, the respondent made a motion to dismiss the complaint. In support of its motion, the respondent indicated that the intent of the appointment process was to staff the position of Lead Hand Technician without incurring additional full-time equivalent staff. Therefore, it had sought and received clearance per s. 43 of the *PSEA*. This allowed it to make an appointment to the position without considering applicants referred through the priority administration system. The complainant had self-referred to the appointment process through that system. It said that the PSC had granted priority clearance effective January 9, 2019. Given that the complainant was not in the area of selection, and given that s. 43 was invoked, the respondent did not give his application any further consideration; it said that he was notified of that on January 23, 2019.

[16] On June 18, 2019, the PSC confirmed that when the indeterminate appointment was made, the complainant had the status of a PPE as a "Leave of Absence Returnee" pursuant to s. 41(1)(a) of the *PSEA*, which had begun on September 5, 2017, and was (at that point) scheduled to end on November 12, 2021.

[17] The complainant responded to the motion on July 3, 2019. He took the position that he was still deemed an employee of the Winnipeg Post Garage and that therefore, *Federal Public Sector Labour Relations and Employment Board Act* and *Public Service Employment Act*

he was within the area of selection. He cited *Agnew v. Deputy Minister of Fisheries and Oceans*, 2018 FPSLREB 2, as authority. He argued that for more than two years, the RCMP had failed to fulfil its responsibilities to him as a PPE.

[18] On July 15, 2019, the Board requested further submissions from the respondent and the PSC with respect to the complainant's status. Further submissions were received from the respondent, the PSC, and the complainant.

[19] On October 10, 2019, another panel of the Board ruled that it still did not have sufficient information on which to make a decision. It denied the respondent's motion to dismiss the complaint, without prejudice to it being able to raise it again once the complaint was set down for a hearing.

B. Complaint 2, and the request to consolidate the complaints

[20] As noted, complaint 2 was made on September 30, 2019. The complainant alleged that his priority status was being bypassed again.

[21] On December 4, 2019, the respondent requested that complaint 2 be consolidated with complaint 1.

[22] In a letter decision dated January 8, 2020, I granted the consolidation request, on the basis that the allegations made in the two complaints were nearly identical, that the indeterminate and acting appointments were to similar posts at the same group and level, and that the appointments arose from the same appointment process.

C. Pre-hearing procedures

[23] The complaints were scheduled to be heard together on December 7 and 8, 2022, and the parties were notified of this on June 10, 2022.

[24] A pre-hearing case management conference (CMC) was held on October 18, 2022. The complainant and his representative both participated, as did representatives for the respondent and the PSC. The Board reviewed with the parties the complainant's allegations and the deputy head and PSC's responses to them. The complainant said that he anticipated calling three witnesses; the respondent said that it anticipated calling one. The PSC indicated that it would not participate in the hearing but that it would only provide written submissions.

D. Request to amend the allegations

[25] Following the CMC, on October 26, 2023, the complainant's representative made a request to add an additional allegation to those originally submitted, which was that the respondent demonstrated bias in determining the area of selection and that it had established that area to exclude the complainant from consideration. I denied the request that same day as it contained no explanation as to why this allegation was not included when the complainant's allegations were initially filed with the Board, as required by s. 23(2)(d) of the *Public Service Staffing Complaints Regulations* (SOR/2006-6; "the *Regulations*").

[26] On October 27, 2022, the complainant's representative resubmitted the request and explained that it was being made at this stage of the proceedings "... due to events that transferred [sic] since filing this complaint."

[27] In a letter decision dated November 15, 2022, I denied the complainant's request to add the allegation that the respondent abused its authority in establishing the area of selection. My reasons for decision were as follows:

...

The Board find [sic] that the complainant's request to amend his allegations does not meet the requirements of s. 23(2) of the Regulations. Namely, no detailed explanation was provided as to why the allegation could not have been made at an earlier stage or what events have transpired since the filing of his complaint. There were also no reasons provided to justify why the complainant needs to amend his allegations, including why it is in the interest of fairness to do so.

In any event, it is not the Board's role to assess whether the area of selection is reasonable (see Umar-Khitab v. Canada (Human Resources and Social Development), 2007 PSST 5 at paras 15 and 21). The Board's mandate, pursuant to s. 88(2) of the Public Service Employment Act, is limited to considering and disposing of complaints made under ss. 65(1), 74, 77 and 83 of the Act. As the Board recently confirmed in Shafaie v. Deputy Head (Department of Health), 2022 FPSLREB 15 at para. 34, those sections do not allow a complaint about the establishment of the area of selection.

...

E. Request to postpone the hearing

[28] Also on November 15, 2022, the complainant's representative requested a postponement of the hearing scheduled for December 7 and 8, 2022, on the basis that

he had another hearing before the Board on the same dates. The respondent did not oppose the request.

[29] The Board requested that the representative provide details of what other hearing was proceeding on those days. In response, he explained he had a settlement conference scheduled for December 7 and 8 in Abbotsford, British Columbia, on another staffing complaint. Upon further review, the Board was able to confirm that he was required only for a pre-settlement conference session of approximately one hour, starting at 2:00 p.m. Eastern time on December 7, 2022.

[30] On November 16, 2022, I denied the complainant's request to postpone the hearing.

[31] Requests to postpone a hearing are to be made in accordance with the Board's *Policy on Postponements of Hearings*. The complainant's representative did not provide me with a clear, cogent and compelling reason as to why the hearing should be postponed.

[32] I provided that a break would be allowed on the afternoon of December 7 sufficient for the complainant's representative to participate in his pre-settlement conference session.

F. Request to start the hearing late

[33] At 11:41 p.m. on the evening of December 6, 2022, the complainant's representative requested a delay to the start of the hearing until 12:00 p.m. Winnipeg time on December 7, 2022, because of the flight delays he was experiencing travelling to Winnipeg.

[34] I agreed to delay the start of the hearing, which had been scheduled to start at 9:30 a.m. Eastern time via videoconference, and to convene a CMC at 1:00 p.m. Eastern time.

[35] During the CMC, I indicated a concern that we would not be able to fully complete the hearing in the time allotted, given that the complainant's representative still had to attend to his pre-settlement conference at 2:00 p.m. and that we would be left with just a little over a day of hearing time, which might not allow for calling all the witnesses and hearing the arguments.

[36] Counsel for the respondent proposed that rather than postponing the hearing entirely, the Board hear arguments on its jurisdictional objection. The complainant's representative agreed. The parties agreed that no witness testimony would have to be heard to address the objection.

[37] The hearing commenced on the afternoon of December 7, 2022, when the complainant's representative returned from his pre-settlement conference.

[38] The parties agreed to rely on the documents in the respondent's book of documents, and they were entered on consent. The complainant requested that one document, tab 33 in his book of documents, be entered on consent, and the respondent agreed.

[39] The complainant's representative then indicated that the complainant wanted to have a witness testify with respect to the history of jobs advertised in the Winnipeg Post Garage and about bias and favouritism.

[40] Counsel for the respondent opposed the complainant's request to call a witness, arguing that the Board had to have jurisdiction to be seized of the complaints. In the absence of the requirement to hear evidence with respect to the Board's jurisdiction, we should proceed to arguments, counsel argued.

[41] I decided to proceed by hearing the parties' arguments with respect to the respondent's jurisdictional objection. I restated my view that given the delay starting the hearing, we could not complete a hearing on the merits of the complaints within the time allotted while also hearing arguments on jurisdiction.

[42] I explained to the parties that if the jurisdictional objection was allowed, the Board would not consider the allegations made in the complaints or render a decision on them. I also indicated that if the jurisdictional objection was **not** allowed, the complaints would be rescheduled, to be heard on their merits.

[43] I repeated that I had not heard from the parties any requirement for oral testimony with respect to the jurisdictional objection that the complainant does not have standing to make these complaints, and that in their arguments, they could rely on those documents entered on consent.

[44] As already noted, the PSC did not participate in the hearing, but it made written submissions on the jurisdictional objections.

III. Summary of the arguments

[45] I will start with the PSC's arguments as they were submitted in advance of the hearing and as the respondent framed its arguments in relation to those of the PSC.

A. For the PSC

[46] The PSC's written submissions addressed the issue of the complainant's right to make a complaint under the *PSEA*, given his status as a PPE, and the implications of the respondent's invocation of s. 43.

[47] The PSC submitted that the invocation of s. 43 of the *PSEA* is delegated to the deputy heads of departments and agencies. Its purpose is to give deputy heads the discretion to not consider a PPE if doing so would result in another person having a priority right.

[48] The invocation of s. 43 does not take away the right to complain to the Board pursuant to s. 77 of the *PSEA*, said the PSC. Although the invocation of s. 43 by the RCMP meant that the complainant did not have the right to be appointed ahead of other candidates, the invocation of s. 43 in and of itself did not deprive him of the right to make a complaint under s. 77, the PSC said.

[49] The PSC argued that the only situation in which the right to make a complaint pursuant to s. 77 is restricted due to the use of the priority administration system is at s. 87 of the *PSEA*, which states that no complaint may be made if a priority appointment has been made.

[50] The PSC argued that the right to make a complaint to the Board is defined in s. 77(2) as being limited to a person who is "... an unsuccessful candidate in the area of selection determined under section 34, in the case of an advertised internal appointment process ...". The Board must determine whether the complainant was in the area of selection defined under s. 34, it said.

[51] In this case, the area of selection was limited to persons who occupied a position in the Winnipeg Post Garage. The PSC submitted that persons with a leave of absence priority placement status, like the complainant, no longer **occupy** a position

within their home organizations, even though they may still be deemed employees for certain purposes, such as benefits. Because the complainant could not exercise his priority status, given the invocation of s. 43, he had to meet the area-of-selection requirement established for the position. Because he did not occupy a position when he applied, he did not have the right of recourse to make a complaint to the Board, the PSC argued.

[52] In making these arguments, the PSC was careful to distinguish between the indeterminate appointment that was the subject of complaint 1 and the acting appointment that was the subject of complaint 2. It said that acting appointments are excluded from certain priority entitlement provisions of the *PSEA* because of section 12 of the *Public Service Employment Regulations* (SOR/2005-334; “the *PSEA Regulations*”). This means that employees like the complainant, who had a leave of absence priority, cannot exercise their entitlement rights to acting appointments.

B. For the respondent

[53] The respondent argued that the two complaints should be dismissed because the complainant was outside the area of recourse set out in s. 77(2) of the *PSEA*. The respondent reiterated that the Board does not have jurisdiction to consider allegations with respect to the area of selection that it established. The PSC has the authority to administer priority entitlements and priority selection.

[54] The respondent agreed for the most part with the PSC’s submissions about who can make a complaint under s. 77 of the *PSEA*. However, it said that the PSC did not sufficiently explain how the invocation of s. 43 plays into the area of recourse. For the respondent, when an exemption under s. 43 is granted, the priority appointment provisions are not applicable. Because of s. 43, the deputy head did not have to consider applicants from the priority system, including the complainant, who had self-referred.

[55] The respondent argued that per s. 77 of the *PSEA*, to make a complaint about an appointment, the person must be an unsuccessful candidate within the area of selection. The area of selection in this case was that the candidate had to occupy a position in the Winnipeg Post Garage. The advertisement for the position was clear. The complainant did not occupy such a position and therefore could not have made a

complaint about an appointment from that process. As such, the Board is without jurisdiction to hear the complainant's complaints, it argued.

[56] The Board and its predecessors have affirmed that complainants must be within the area of selection to make a complaint, the respondent argued. In *Shafaie v. Deputy Head (Department of Health)*, 2022 FPSLREB 15, the Board considered whether a complainant from outside the area of selection could make a complaint that a deputy head had restricted the area of selection, to prevent a complainant from exercising a right of recourse, and ruled that the Board was without jurisdiction (see paras. 3, 7, 10 to 12, 22 to 24, 26, 28, 29, 34, and 35).

[57] For affirmation that the Board cannot consider a complaint about an area of selection, the respondent also cited *Umar-Khitab v. Deputy Head of Service Canada*, 2007 PSST 5 at paras. 15, 16, and 21, and *Gulia v. Chief Administrator of the Courts Administration Service*, 2020 FPSLREB 39 at paras. 19 and 20 (upheld 2021 FCA 106; see para. 14).

[58] Asked about the plain meaning of what it means to occupy a position, the respondent argued that an employee has to be in a position. It noted that when it invoked s. 43, it provided a rationale for the establishment of the area of selection because the former position of whoever was hired would be deleted since the Winnipeg Post Garage was not looking to increase its current staffing levels.

[59] Occupying a position is not the same as being an employee, the respondent argued. If that were the correct interpretation, the area of selection would not have used the word "occupy"; it would have used "employee". "Occupying" is a present-tense word. The fact that the complainant might have once occupied a position in the Winnipeg Post Garage was of no consequence. The appointment process required an employee to occupy a position when the application was made.

[60] Asked what recourse exists for a PPE to complain if they cannot be considered, the respondent said that it is not up to the Board to deal with this question. Although the authority to invoke s. 43 is delegated to the deputy head, ultimately, the PSC's priority entitlement division is the final authority. That is where the complainant could seek recourse, the respondent said (see *Magee v. Commissioner of the Correctional Service of Canada*, 2011 PSST 12 at para. 20, and *Scott v. Deputy Head (Department of Transport)*, 2022 FPSLREB 45 at para. 52). Ultimately, a decision by the PSC on its

administration of the priority entitlement system could be judicially reviewed by the Federal Court, the respondent argued. It cannot go to the Board unless the Board is properly seized.

[61] The respondent disagreed with the complainant's 2019 submission, made in response to its motion to dismiss, that the Board's decision in *Agnew* served as authority for the Board to take jurisdiction. In *Agnew*, s. 43 of the *PSEA* was not engaged. The candidate was assessed and was determined to be in the area of selection, and therefore deemed to be an unsuccessful candidate with the right of recourse.

C. For the complainant

[62] At the hearing, the complainant's representative argued the following points:

- In 2016, the complainant took a leave of absence to care for a family member.
- Before that leave was taken, there was an additional position in the Winnipeg Post Garage.
- In 2017, only days before he was to return from leave, the RCMP backfilled his position.
- Since then, the RCMP has restricted its postings to employees of the Winnipeg Post Garage.
- The complainant has a very different interpretation than does the respondent of what it means to occupy a position in the Winnipeg Post Garage. He was an employee, and therefore he occupied a position.
- The *Priority Administration Directive* states that if a person on leave without pay is to be replaced, the person with the delegated authority "... is to make every effort to provide suitable employment for the person following the leave of absence."
- The PSC's policies on assessment state that departments should assess candidates without bias, and without conflict of interest, in a transparent and fair manner.
- Since his leave of absence ended, the complainant has been shut out of appointment processes to return to the Winnipeg Post Garage and cannot even be assessed.

- The complainant does not even know who made the decision to approve the area of selection on the posters used for the appointment process. The Board should be able to review that.
- The complainant has been on priority status for six years, and every attempt that he has made to return to active employment has been unsuccessful. He deserves to be placed back in his job.

[63] I asked the complainant's representative if he wished to comment on the document at tab 33 of the complainant's book of documents, as he had requested that it be entered as an exhibit on consent.

[64] The document is a letter addressed to the complainant titled "Letter informing employee of administrative investigation" and dated August 14, 2019. The letter advised the complainant that the RCMP was commencing an administrative investigation into allegations of theft at the Winnipeg Post Garage, including tires, shelving, and other items. The letter explained that he would be able to present clarifications or extenuating circumstances during the investigation and that if the allegations were determined founded, administrative or disciplinary measures might be taken.

[65] The complainant's representative argued that the letter confirms that the complainant remained an employee of the Winnipeg Post Garage. That is how he and everyone else who has read the letter interpret it, but the respondent reads it differently.

[66] The complainant was part of the Winnipeg Post Garage for 14 years and deserves to be placed back in the position. He would like an opportunity to argue that point, his representative argued.

[67] No case law was cited by the complainant's representative. He did not speak to the case law cited by the respondent.

[68] Given the brevity of the complainant's arguments at the hearing, I will also report on some of his direct submissions made during the intake process of the complaints.

[69] On July 2, 2019, in response to the respondent's motion to dismiss complaint 1, the complainant said that the PSC's submissions affirmed that he was still deemed an employee of the Winnipeg Post Garage. He said that that was his substantive position before he was placed on leave without pay priority entitlement status by the department.

[70] He argued that the Board should have jurisdiction to investigate why the respondent chose the appointment process and area of selection when it knew that he was on priority status for reappointment, that the staffing of the position was originally designed to create a vacancy, that the respondent changed its hiring practices only after he had been given priority status, and that according to the *Priority Administration Directive*, the respondent is to make every effort to help him find a job. He argued that the Winnipeg Post Garage is a very busy workplace and that the respondent's actions have left a work area vacant, complete with tools available to be used. He argued that the respondent used overtime and contractors to fill the gap when it should have allowed him to return to work.

[71] On August 29, 2019, he made supplementary submissions on the respondent's motion to dismiss complaint 1. He stated that the Winnipeg Post Garage manager had left his position to relocate to British Columbia and that management could have created a staffing process that would have opened up a position to him. He also commented on the August 14, 2019, letter informing him of an administrative investigation in relation to alleged theft at the Winnipeg Post Garage. He asked how he could have been subject to an administrative investigation if he did not occupy a position.

IV. Reasons

[72] Given the respondent's motion, the question before me is whether the complainant had the standing to make these complaints, which are that the respondent abused its authority when it made the indeterminate appointment that is the subject of complaint 1 and the acting appointment that is the subject of complaint 2.

[73] To answer this question, one must start with wording of s. 77 of the *PSEA*, which sets out who can make a complaint to the Board. It reads as follows:

77 (1) When the Commission has made or proposed an appointment in an internal appointment process, **a person in the area of recourse referred to in subsection (2)** may — in the manner and within the period provided by the Board's regulations — make a complaint to the Board that he or she was not appointed or proposed for appointment by reason of

(a) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2);

(b) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process; or

(c) the failure of the Commission to assess the complainant in the official language of his or her choice as required by subsection 37(1).

Area of recourse

(2) For the purposes of subsection (1), **a person is in the area of recourse** if the person is

(a) an unsuccessful candidate in the area of selection determined under section 34, in the case of an advertised internal appointment process; and

(b) any person in the area of selection determined under section 34, in the case of a non-advertised internal appointment process.

...

77 (1) Lorsque la Commission a fait une proposition de nomination ou une nomination dans le cadre d'un processus de nomination interne, **la personne qui est dans la zone de recours visée au paragraphe (2)** peut, selon les modalités et dans le délai fixés par règlement de la Commission des relations de travail et de l'emploi, présenter à celle-ci une plainte selon laquelle elle n'a pas été nommée ou fait l'objet d'une proposition de nomination pour l'une ou l'autre des raisons suivantes :

a) abus de pouvoir de la part de la Commission ou de l'administrateur général dans l'exercice de leurs attributions respectives au titre du paragraphe 30(2);

b) abus de pouvoir de la part de la Commission du fait qu'elle a choisi un processus de nomination interne annoncé ou non annoncé, selon le cas;

c) omission de la part de la Commission d'évaluer le plaignant dans la langue officielle de son choix, en contravention du paragraphe 37(1).

Zone de recours

(2) Pour l'application du paragraphe (1), **une personne est dans la zone de recours** si :

a) dans le cas d'un processus de nomination interne annoncé, **elle est un candidat non reçu et est dans la zone de sélection définie en vertu de l'article 34;**

b) dans le cas d'un processus de nomination interne non annoncé, elle est dans la zone de sélection définie en vertu de l'article 34.

[...]

[Emphasis added]

[74] As s. 77(1) relies on s. 77(2), which in turn relies on s. 34 of the *PSEA*, it is important to consider that provision, which reads as follows:

Area of selection

34 (1) For purposes of eligibility in any appointment process, other than an incumbent-based process, the Commission may determine an area of selection by establishing geographic, organizational or occupational criteria or by establishing, as a criterion, belonging to any of the designated groups within the meaning of section 3 of the Employment Equity Act.

Zone de sélection

34 (1) En vue de l'admissibilité à tout processus de nomination sauf un processus de nomination fondé sur les qualités du titulaire, la Commission peut définir une zone de sélection en fixant des critères géographiques, organisationnels ou professionnels, ou en fixant comme critère l'appartenance à un groupe désigné au sens de l'article 3 de la Loi sur l'équité en matière d'emploi.

Designated groups

(2) The Commission may establish different geographic, organizational or occupational criteria for designated groups within the meaning of section 3 of the Employment Equity Act than for other persons.

Groupes désignés

(2) La Commission peut établir, pour les groupes désignés au sens de l'article 3 de la Loi sur l'équité en matière d'emploi, des critères géographiques, organisationnels ou professionnels différents de ceux qui sont applicables aux autres.

[75] In this matter, the RCMP used an advertised internal appointment process to make the indeterminate and acting appointments that are the subjects of these complaints. The area of selection was described in the advertisement as follows: "Persons employed at the Royal Canadian Mounted Police **occupying a position** in the Post Garage Unit in Winnipeg, Manitoba" [emphasis added]. Per s. 77, only an unsuccessful candidate in this area of selection has the right to make a complaint to the Board.

[76] According to both the respondent and the PSC, the complainant did not **occupy** a position in the Winnipeg Post Garage when the appointment process was launched or when the indeterminate and acting appointments were made. Although he was still considered an employee, he did not occupy a position. Therefore, he was outside the area of selection established by the delegated authority, pursuant to s. 34 of the *PSEA*. Because he was outside the area of selection, he did not meet the requirement set out

at s. 77(2) of being "... an unsuccessful candidate in the area of selection determined under section 34 ..." and therefore did not enjoy the right of recourse set out in s. 77(1).

[77] The complainant submitted that he had a right to have his complaint heard, as he remained an employee of the Winnipeg Post Garage, as confirmed by the August 14, 2019, letter informing him that he was under administrative investigation for possible discipline.

[78] I have considered the letter that the RCMP provided to the complainant dated August 29, 2017, informing him that his position had been backfilled and that he would be given priority status for reappointment. Nothing in the letter suggests that he continued to occupy a position in the Winnipeg Post Garage. In fact, the letter informed him that "... your position has now been staffed on an indeterminate basis ...". The letter told him that at the end of his period of leave of absence, he would be granted priority status for reappointment. The letter sets out the entitlements of a person with statutory priority for reappointment but does not convey more than that. Overall, the letter conveys the message that the complainant would **not** have a position to return to at the end of his leave, and that he would have to search for a new position as a PPE.

[79] I have considered the letter of administrative investigation sent to the complainant and dated August 14, 2019. In that letter, the RCMP conveyed to him that it was investigating allegations he had been involved in the theft of tires, shelving, and other items. The letter clearly describes the complainant as an employee, but it does not in my view stand as proof that he occupied a position in the Winnipeg Post Garage.

[80] The plain-language definition of what it means to occupy a position, according to the Merriam-Webster Dictionary, is "... to fill or perform the functions of (an office or position)". The complainant was not filling a position at the Winnipeg Post Garage or performing any functions for the RCMP when he applied for the lead hand technician position. I accept that he once occupied a position in that garage, but after he was given priority status for **reappointment**, he no longer occupied such a position. The word "reappointment" reinforces my conclusion that the complainant was no longer an occupant of a position.

[81] I conclude that the complainant did not occupy a position in the Winnipeg Post Garage when he applied to the appointment process, and so was not in the area of selection. As such, he did not have standing to make these complaints to the Board.

[82] I have also considered the arguments of the respondent and the PSC with respect to the impact of s. 43 on the complainant's right of recourse. This is important because the complainant submitted an application to the appointment process by referring himself under the provisions of the priority administration system.

[83] The priority administration system is administered by the PSC to fulfil the requirements of ss. 39 to 46 of the *PSEA*. These sections give certain persons priority status for appointment over others. Among PPEs are veterans, employees declared surplus (for example under the workforce adjustment provisions of a collective agreement), persons such as the complainant who were replaced during a period of leave of absence and wish to return, and employees who had been laid off.

[84] The section of the *PSEA* relevant to the complainant is s. 41(1), which gives priority status for reappointment to employees returning from a leave of absence.

[85] Departments must give priority for appointment to PPEs, unless s. 43 of the *PSEA* is engaged. That section reads as follows:

43 ... if the Commission considers that the appointment of a person who has a right to be appointed in priority to other persons under any of those provisions will result in another person having a priority right, the Commission may decide not to apply that provision in that case.

43 [...] la Commission peut, lorsqu'elle est d'avis que la nomination d'une personne qui a droit à une priorité de nomination en vertu de l'une de ces dispositions aurait pour effet d'accorder à une autre personne le droit à une priorité de nomination, décider de ne pas appliquer cette disposition dans ce cas.

[86] In essence, what s. 43 means is that a department need not appoint someone through the priority administration system if making that appointment means that another person will end up being laid off and having a priority right.

[87] In its submissions, the PSC noted that the authority to invoke s. 43 is delegated to deputy heads.

[88] In this particular case, the delegated authority at the RCMP invoked s. 43 for the indeterminate appointment in accordance with a rationale that read as follows:

The intent of this staffing request is to fill a vacant second lead hand senior technician position at the Winnipeg Post Garage. Once this position is filled the 'right fit' candidate's old position will be deleted as the D Division Post Garage is not looking to increase current staffing levels; thus the requirement for an internal advertised staffing request.

[89] I agree with the respondent and the PSC that the invocation of s. 43 meant that the RCMP had no obligation to consider the complainant as a priority appointment for the indeterminate position. I also agree that this engagement of s. 43 applies only to the indeterminate appointment (complaint 1). As argued by the PSC, s. 12 of the *PSEA Regulations* provides that the priority administration system does not apply to acting appointments, such as the one that led to the making of complaint 2.

[90] I find myself in agreement with the PSC that the invocation of s. 43 does not in and of itself take away the right of PPEs to make a complaint under s. 77 of the *PSEA*. As confirmed by the Board in *Agnew* (see paragraphs 90 to 94), PPEs can apply for positions, and if they are considered and not appointed, they may enjoy a right of recourse under the *PSEA*.

[91] However, in this matter, the complainant's self-referral through the priority administration system was not accepted by the respondent, given its invocation of s. 43. Because his self-referral (for the indeterminate position) was not accepted, he had to meet the area of selection established for the appointment process, in order to be assessed. Because he did not occupy a position in the Winnipeg Post Garage, he was not assessed. The complainant was outside the area of selection for the appointment process, and he did not enjoy the right of recourse available under s. 77 of the *PSEA*. As such, the Board is without jurisdiction to render a decision on these complaints, and they are dismissed.

[92] I understand that the complainant is aggrieved about a number of aspects of his employment situation with the RCMP. He is clearly upset that it decided to backfill his position shortly before he was due to return from a leave of absence. He is aggrieved by the fact that he was given priority appointment status rather than being rehired. He is aggrieved that after more than five years in the priority system, he had (as of the

date of the hearing) still not succeeded in being reappointed to a position for which he believes he is qualified. He said that the way in which the RCMP has posted positions over the course of the last few years means that he cannot apply, and he has been unable to secure recourse. He has appeared before this Board on other complaints, where some of these issues have been raised (see *Lysak v. Commissioner of the Royal Canadian Mounted Police*, 2019 FPSLRB 51, and *Lysak v. Commissioner of the Royal Canadian Mounted Police*, 2020 FPSLRB 110).

[93] While I recognize there are a number of issues about which the complainant is aggrieved, the Board may render decisions and order remedies only when it has the jurisdiction to do so.

[94] For the reasons already provided in the Board's letter decision of November 15, 2022, and repeated earlier in the section on procedural issues, the *PSEA* does not allow complaints to be made that a deputy head abused its authority when establishing the area of selection. This has been affirmed by the Board and its predecessors numerous times (see *Umar-Khitab*, at paras. 15, 16, and 21, *Shafaie*, and *Gulia*, at paras. 19 and 20).

[95] Similarly, the Board does not have jurisdiction to consider a complaint that either the complainant's home organization (the RCMP) or the PSC has failed to fulfil its obligations under the priority administration system. This Board's jurisdiction is prescribed by s. 88 of the *PSEA* to complaints made under ss. 65(1), 74, 77, and 83.

[96] Finally, for the reasons provided, the Board does not have jurisdiction to render a decision for a complainant that is outside the area of selection established by the respondent for the appointment process in question.

[97] I have noted several issues that arose with respect to the representation provided to the complainant by his representative. In addition to those issues, the complainant's representative made only brief arguments in support of the complainant's position that the Board should take jurisdiction. Unfortunately, these were mostly off-point. The representative did not cite any case law or provide any argument in response to the case law cited by the respondent.

[98] Given those issues, I have reported in more detail the submissions made directly by the complainant through the complaint process. None of those submissions have

led me to conclude that the complainant occupied a position in the Winnipeg Post Garage. I find that the legislation and case law are clear and that the Board is without jurisdiction to render a decision on his complaints.

[99] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[100] The respondent's objection to the Board's jurisdiction is allowed.

[101] The complaints are dismissed.

January 9, 2024.

**David Orfald,
a panel of the Federal Public Sector
Labour Relations and Employment Board**